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Constitutional Law-Privileges and Immunities-Colgate v. Harvey

CONSTITUTIONAL LAW—PRIVILEGES AND IMMUNITIES—COLGATE V. HARVEY.—Kentucky placed a property tax five times as great on out of state bank deposits as on deposits within the state. Upon the death of the plaintiff's decedent the state attempted to assess out of state deposits which were then disclosed The plaintiff contested the tax on the ground that it was an improper classification and therefore violated the due process and equality clauses of the 14th Amendment, and that it was discriminatory and violated the privileges and immunities clause, citing *Colgate v. Harvey*[1] as authority. The Court of Appeals upheld the tax. Held, affirmed. The classification was proper and the privilege of depositing in out of state banks free from discriminatory taxes is not a privilege of United States citizenship. *Colgate v. Harvey* is overruled. *Madden v. Kentucky* (1940), 60 Sup. Ct. 406.

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19 City of Terre Haute v. Evansville, etc., R. Co. (1897), 149 Ind. 174, 46 N. E. 77; City of Indianapolis v. State ex rel. Barnett (1909), 172 Ind. 472, 132 N. E. 165; Bemis v. Guirl Drainage Co. (1914), 182 Ind. 36, 105 N. E. 496; State ex rel. School City of South Bend v. Thompson (1937), 211 Ind. 267, 6 N. E. (2d) 710, WILLIS, CONSTITUTIONAL LAW (1936), 151.

The exercise of the appointative power is theoretically an executive function. Appointments are now, however, made by all three departments of government; therefore the legislature, as a duty determining branch can assign the duty to appoint magistrates to the judiciary since selection is not otherwise provided for by the Constitution. City of Indianapolis v. State ex rel. Barnett (1909), 172 Ind. 472, 132 N. E. 165; State ex rel. School City of South Bend v. Thompson (1937), 211 Ind. 267, 6 N. E. (2d) 710; WILLIS, CONSTITUTIONAL LAW (1936), 151.

1 Colgate v. Harvey (1936), 296 U. S. 404, 56 S. Ct. 252, 80 L. Ed. 299. Vermont placed a discriminatory tax on out of state loans and the Supreme Court held it an improper classification and invalid, but, apparently not too satisfied with this as a ground, said that even if the classification were proper it violated the privileges and immunities clause of the 14th Amendment.

The provision in the 14th Amendment that no state shall abridge the privileges and immunities of citizens of the United States was a *post bellum* attempt, at least by the Republican party, to centralize the protection of private rights in the federal government. This clause was apparently intended by the framers of the amendment to protect rights, powers, privileges, and immunities, which were described as fundamental, against state action.[2] When first before the Supreme Court, however, it was interpreted to include only those rights which owe their existence to the constitution, treaties, or laws of the federal government, and the court denied that this clause created any new rights or delegated any new powers.[3] A party first had to prove national citizenship, thus excluding aliens and corporations, and then prove an invasion of a right accruing to the individual from other parts of the constitution or a statute or treaty enacted under the constitution.[4] Since the single fact of the constitution and laws of the United States creating a privilege or granting an immunity was sufficient to protect the privileges or immunities, this clause became almost a dead letter.[5]. A few years later the intent of the framers of the privileges and immunities clause was given effect under the due process clause, and, since this clause was not limited to citizens, aliens and corporations were protected as well.[6] Thus the aggrieved party, clutching at straws, resorted to the privileges and immunities clause only when no specific federal guaranty could be found for the protection of what he wishfully considered an inalienable right. This accounts for the number of cases in which protection under the privileges and immunities clause was alleged and found wanting.[7]

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[2] This amendment in congress received almost no support from the democrats. The meaning was discussed by Bingham, in Congressional Globe, 39th Cong., 1st Sess., part 2, pp. 1090, (1866).

[3] Slaughterhouse Cases (1873), 16 Wall. 36. By a 5 to 4 decision the majority of the court under Chief Justice Miller held a Louisiana statute creating a monopoly of slaughterhouse business and prohibiting others from participating in this business not to violate the privileges and immunities clause of the 14th Amendment. The minority under Justice Field insisted that the clause should protect those fundamental rights of citizens outlined in Corfield v. Coryell (1825), 4 Wash. C. C. 371, as protected by the privileges and immunities clause in Sec. II, Art. IV of the United States Constitution. *Cf.* In re Kemmler (1890), 136 U. S. 436; Minor v. Happersett (1875), 21 Wall. 162; Twining v. N. J. (1908), 211 U. S. 78; Presser v. Illinois (1886), 116 U. S. 252. The first allegation of a federal privilege arising out of a treaty was in Hamilton v. Regents of Univ. of Calif. (1934), 293 U. S. 245.

[4] Presser v. Illinois (1886), 116 U. S. 252.

[5] U. S. v. Cruickshank (1875), 92 U. S. 542; Ownbey v. Morgan (1921), 256 U. S. 94. See also Justice Field's dissent in the Slaughterhouse Cases (1873), 16 Wall. 36.

[6] Bouchard, THE SUPREME COURT AND PRIVATE RIGHTS (1938), 47 Yale L. J. 1051. It is interesting to note that the meaning of the due process clause was expanded under Justice Field, the leader of the dissenting justices in the Slaughterhouse Cases.

[7] Colgate v. Harvey (1936), 296 U. S. 404, Justice Stone's dissent, p. 445. "Since the adoption of the 14th amendment at least forty-four cases have been brought to this court in which state statutes have been assailed as infringements of the privileges and immunities clause. Until today none has held that state legislation infringed that clause." For a list of these cases see footnote two of this same dissent.

It has been held that the right to practice law,[8] the right to vote,[9] the rights designated in the first eight amendments,[10] the right to sell or possess liquor,[11] the right to use the American Flag for advertising,[12] the right to obtain dower,[13] the right to buy junk without inquiry as to previous ownership,[14] and the right to attend state universities are not attributes of federal citizenship. In some of the above situations the court in dicta has said that the right to assemble for the purpose of discussing national legislation,[16] the right to free ingress and egress from a state,[17] the right to be protected from unlawful violence while in the custody of a federal marshal,[18] and the right to establish homesteads on federal lands[19] were some of the privileges and immunities of federal citizenship.

The first case in which a state law was held unconstitutional under the privileges and immunities clause was *Colgate v. Harvey* in 1936. In that case the right of citizens to engage in extra-state transactions (lending money) free from tax discrimination was held protected by this hitherto superfluous clause.[20] Apparently this was an extension of the clause to protect those interstate transactions not covered by the present definition of interstate commerce. This was practically a reversion to the rejected argument in the Slaughter-

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[8] Bradwell v. Illinois (1873), 16 Wall. 130; In re Lockwood (1893), 154 U. S. 116.

[9] Minor v. Happersett (1875), 21 Wall. 162; McPherson v. Blacker (1892), 146 U. S. 1. But see Ex Parte Yarabough (1884), 110 U. S. 651, the right to vote only arises where states have given the right to vote in state elections and is a right to freedom from discrimination only.

[10] Walker v. Sauvinet (1875), 92 U. S. 90 (Trial by jury); Presser v. Illinois (1885), 116 U. S. 252 (Right to bear arms); McElvaine v. Brush (1891), 142 U. S. 155 (Cruel and inhuman punishments); Maxwell v. Dow (1899), 176 U. S. 581 (Trial by eight jurors); Twining v. N. J. (1908), 211 U. S. 78 (Exemption from self incrimination).

[11] Bartemeyer v. Iowa (1874), 18 Wall. 129; Cox v. Texas (1906), 202 U. S. 446; Crane v. Cambell (1917), 245 U. S. 304; Crawley v. Christensen (1890), 137 U. S. 86; Giozza v. Tiernam (1892), 148 U. S. 657.

[12] Halter v. Nebraska (1907), 205 U. S. 34.

[13] Ferry v. Spokane (1922), 258 U. S. 314.

[14] Rosenthal v. N. Y. (1912), 226 U. S. 260.

[15] Hamilton v. Regents of Univ. of Calif. (1934), 293 U. S. 245; Waugh v. Board of Trustees of Univ. of Miss. (1915), 237 U. S. 589.

[16] Hague v. C. I. O. (1939), 59 S. Ct. 954. In this case the majority of five split on the reason for the unconstitutionality of a city ordinance which prevented a public labor meeting in which one of the purposes was the discussion of national legislation. Two Justices held this violated the privileges and immunities clause and two that it violated the right to free speech under the due process clause and Chief Justice Hughes agreed in part with each. One explanation of this may be on a difference of opinion as to the jurisdictional question in the case. However it can hardly be said to support Colgate v. Harvey for, if the two Justices who based their reasoning on the due process clause are correct, as to citizens this would of necessity also violate the privileges and immunities clause.

[17] In re Charge to Grand Jury (1875), 30 Fed. Cases No. 18,260. As an example of how these rights are protected by other parts of the constitution, note that the right to ingress and egress from the state is also protected by the commerce clause. Caminetti v. U. S. (1917), 242 U. S. 470.

[18] Logan v. U. S. (1891), 144 U. S. 263.

[19] U. S. v. Waddell (1884), 112 U. S. 76.

[20] Colgate v. Harvey (1936), 296 U. S. 404, 56 S. Ct. 252.

house Cases,[21] i. e. to the protection of those fundamental rights of citizens of all free governments.[22] Under the due process and equality clauses the same result could have been reached with little, if any, change in their meaning. Furthermore, if the real reason for the prevention of discrimination were the interstate character of the transactions, the protection would have been more adequate by reverting to Chief Justice Marshall's definition of commerce, namely, traffic or transportation.[23] The abandonment of a long established, though emasculated, interpretation of the privileges and immunities clause of the 14th Amendment seemed unjustified and was criticized greatly.[24]

The express overruling of *Colgate v. Harvey* in the principal case therefor, would seem a valid result. The matter of federal court supervision of state regulation has been in enough confusion under the due process and equality clause without inviting increased litigation by giving the privileges and immunities clause a broad undefined meaning. Since there is little if any difference in lending money through promissory notes and lending money through bank deposits the court should be commended for not finding some spurious distinction between the principal case and *Colgate v. Harvey* and for doing something which it rarely has done, openly overruling a former case. Apparently the Supreme Court has sent the privileges and immunities clause of the 14th Amendment back into the obscurity from whence it was unnecessarily summoned in 1936. W. E. B.

PATENTS—REISSUES—INTERVENING RIGHTS.—Plaintiff held a patent on a machine suitable for displaying roasted nuts, keeping them hot, and from which they could be vended. Defendant acquired similar machines from a manufacturer and without knowledge of plaintiff's patent used them. Six months thereafter the defendant learned of plaintiff's patent. The defendant's machines did not infringe plaintiff's patent and he continued to use them. Three months after defendant learned of plaintiff's patent, and within two years of the issue of it plaintiff applied for and secured a reissue patent which was broad enough to cover the machines used by defendant. Plaintiff then sued defendant for infringing the reissue patent. Defendant claimed its use of the machines before reissue without infringing the original patent created intervening rights sufficient to amount to an absolute defense. Held, reissue patent valid and infringed; defendant may not bar the action as he has no intervening rights. *National Nut Co. v. Sontag Chain Stores* (C. C. A. 9th, 1939), 107 F. (2d) 318.

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21 Slaughterhouse Cases (1873), 16 Wall. 36 (minority opinion).

22 For a discussion of what are considered "fundamental rights" see Corfield v. Coryell (1825), 4 Was. C. C. 37, a case relating to the privileges and immunities clause under Sec. II, Art. IV of the Constitution.

23 Willis, *Gibbons v. Ogdon, Then and Now* (1940), 28 Ky. L. J. 280. Note that a former interpretation of the Commerce Clause discussed in this article on page 383 might have been used to effect the same result as that reached in Colgate v. Harvey under the privileges and immunities clause.

24 30 Ill. L. J. 953; 84 U. of Pa. L. R. 655; 45 Yale L. J. 926; 13 N. Y. U. L. Q. Rev. 496; 49 Har. L. R. 935; 3 U. of Chi. L. R. 506; 36 Col. L. R. 669; 20 Minn. L. R. 549; 11 Ind. L. J. 390; 2 U. of Pitts. L. R. 202; 1 Mo. L. R. 187; 11 Wis. L. R. 434; 14 N. C. L. R. 282; 5 Fordham L. R. 352; 34 Mich. L. R. 1034; 14 Tex. L. R. 548.